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# CHOICE OF LAW AND THE UNCITRAL HARMONIZATION PROCESS

*Jenny Clift\**

The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.<sup>1</sup>

## INTRODUCTION

Over the last twenty years, the United Nations Commission on International Trade Law (UNCITRAL) has focused on elaborating, in accordance with its mandate,<sup>2</sup> a number of legislative texts in the field of insolvency law that seek, as their goal, to minimize the impact of conflicts arising from differences between insolvency laws. This goal is to be achieved, firstly, through harmonization of insolvency law and, secondly, by promoting cooperation and coordination in cross-border proceedings. Relatively limited parts of those harmonized texts specifically address choice of law rules in insolvency, although some small steps have been taken in that direction, as outlined below.

This Article looks at the work undertaken by UNCITRAL to date on choice of law issues in the insolvency field against the backdrop of the organization's work on harmonization and modernization of insolvency law generally, and the impact of that work on reducing differences that lead to conflicts, and, by promoting cooperation and coordination, improving familiarity with and acceptance of those differences. It seeks to explore the extent to which harmonization of law, and thus the elimination of

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1. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

2. G.A. Res. 2205 (XXI), § II ¶ 8, U.N. Doc. A/RES 2205 (XXI) (Dec. 17, 1966) provides

- (a) Coordinating the work of organizations active in this field and encouraging cooperation among them; (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade; (e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade; (f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development; (g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade; and (h) Taking any other action it may deem useful to fulfill its functions.

differences, can be achieved without directly engaging with choice of law issues. Part I provides an introduction to UNCITRAL's work to the harmonization of insolvency law and examines the extent to which choice of law issues have been considered. It notes the success that has been achieved in harmonizing insolvency law by adopting an incremental approach that seeks to maintain the balance between progress and consensus. Part II introduces the international work undertaken with a view to harmonizing insolvency law in the early 1990s, while Part III focuses on cross-border insolvency and the negotiation of the UNCITRAL Model Law on Cross-Border Insolvency. It considers the deliberations on choice of law issues and how solutions were found that did not require those issues to be addressed directly. It expands upon the concept of "centre of main interests" (COMI) as a choice of jurisdiction rule, detailing recent work to bring more certainty to the application and interpretation of that concept. Part IV introduces work undertaken by UNCITRAL after the Model Law, in particular the UNCITRAL Legislative Guide on Insolvency Law. This text and its approach to applicable law issues is considered in Part V. The Article concludes with proposals for future work and the role choice of law issues are likely to play in that work.

## **I. APPROACHING THE HARMONIZATION OF INSOLVENCY LAW: AN INCREMENTAL APPROACH**

Harmonization of laws is generally thought to facilitate international trade by achieving various goals, including reducing jurisdictional differences, facilitating cooperation and coordination via a common approach, improving the efficiency and predictability of transactions, and enhancing the transparency of the law by adherence to a common standard. While the difficulties, or even impossibilities, of harmonizing international insolvency law may be the subject of some debate, UNCITRAL has been working productively in this field for over twenty years and has a considerable agenda of possible future work.

From the harmonization perspective, the texts completed by UNCITRAL in the international insolvency field can be said to have taken significant steps towards achieving, to a greater or lesser extent, the general goals of harmonization cited above. As such, these texts are an advance on what existed before their development, and their success has proven to be the catalyst for further steps to be taken. That success, it has been suggested, lies in the need for incremental reform in insolvency law,<sup>3</sup> reform that would allow "sovereignty-sensitive states to acclimate to the extraterritorial reach of foreign laws."<sup>4</sup> Certainly, that acclimation is

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3. Susan Block-Lieb & Terence Halliday, *Incrementalisms in Global Lawmaking*, 32 *BROOK. J. INT'L L.* 851, 853 (2007).

4. John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 *VIRG. J. INT'L L.* 935, 1011 (2005).

facilitated by the harmonization process, where discourse between States on the issues at stake results in greater familiarity with those issues and their associated difficulties and, often, a greater willingness to embrace the solutions being proposed.<sup>5</sup> As has been suggested,

success in taking a series of small steps is preferable to having made an unsuccessful attempt at achieving grand plans. Over time the repeated meeting of incremental improvements sets up expectations that its success will occur as a matter of course. Since that success involves the perceived rightness of its actions and products, audiences will be more inclined to take-for-granted the naturalness of obedience, compliance, or conformity to the norms promulgated by the organization.<sup>6</sup>

Despite the progress to date, there are many entrenched obstacles to harmonization of insolvency law. A particular obstacle is that the law expresses the choices a State must make about a number of relevant social, political, financial, and other considerations that have an impact on the economic and legal goals of its insolvency proceedings,<sup>7</sup> as well as on the State's view of foreign law. As one commentator has suggested,

although at a general level all bankruptcy regimes might find themselves aligned in overarching goals, such as "protection and maximization of the value of [a] debtor's assets", consensus dissolves soon after that . . . [and] a greater recipe for an international conflict of laws in the cross-border setting might be difficult to imagine.<sup>8</sup>

For those reasons, it is, perhaps, not surprising that choice of law as a topic has not been confronted directly in UNCITRAL's insolvency work. That is not to suggest that the need to address choice of law has not been raised or emphasized in the course of that work. The topic has been a subject not only of consideration in the texts developed to date, but also of proposals for possible future work on several relevant occasions, as will be discussed below. It has not, however, been accorded a high priority on UNCITRAL's insolvency work agenda as a separate topic. Historically, difficult, highly technical, and controversial topics have often been postponed in UNCITRAL deliberations, with the group's intention of revisiting the issue at a later time. One example is the treatment of enterprise or corporate groups in insolvency during development of the

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5. Jenny Clift, *Developing an International Regime for Transnational Corporations: The Importance of Insolvency Law to Sustainable Recovery and Development*, 20 TRANSNAT'L CORP. 117, 141 (2011).

6. Block-Lieb & Halliday, *supra* note 3, at 855.

7. UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, U.N. Sales No. E.05.V.10 (2004) [hereinafter UNCITRAL LEGISLATIVE GUIDE].

8. Pottow, *supra* note 4, at 941–42 (quoting MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, U.N. Sales No. E.99.V.3 (1999)).

UNCITRAL Legislative Guide on Insolvency Law.<sup>9</sup> Often that postponement facilitates a gradual move toward developing a text to address relevant questions that is ultimately a more successful approach than confronting difficult issues immediately as they arise.

Arguably, choice of law fits into that category, with the added factor that it is seen by many as, traditionally, the province of other international organizations, such as the Hague Conference on Private International Law.<sup>10</sup> Moreover, it may not always be necessary, in a process focusing on harmonization of law, to address a particular issue from the choice of law point of view. Where a text seeks to establish a uniform standard, for example, the expectation of the drafters is typically that the text will be widely adopted and thus form the domestic law on a particular issue. That might provide a persuasive argument that choice of law issues may not need to be addressed in that text, provided that text could resolve those particular issues via the harmonization process and reduce the scope for differences between insolvency laws. Some of the substantive differences between insolvency laws are being chipped away through the establishment of international standards, which illustrate what an effective national insolvency law should look like, and through encouraging States to follow those standards when reforming or updating their insolvency laws.<sup>11</sup> One such international standard is the UNCITRAL Legislative Guide.

## II. HARMONIZING INSOLVENCY LAW: THE EARLY YEARS

The conventional wisdom in the 1990s was that insolvency laws were not likely to be harmonized at any time in the near future<sup>12</sup> and, notwithstanding the desirability of cooperation between States in insolvency matters, that it was unrealistic to suppose the principle of universality of insolvency proceedings could be attained at the global or even regional level in the foreseeable future.<sup>13</sup> It was said that it would continue to be unacceptable that interests and expectations arising under

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9. UNCITRAL LEGISLATIVE GUIDE, *supra* note 7, at 249, pt. two, ch. V, sec. C includes an introduction to that topic. Part Three of the Legislative Guide, which was adopted in 2010, deals with these issues more extensively. UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, PART THREE, U.N. Sales No. E.12.V.16 (2010).

10. Whenever it is raised as an issue to be addressed by UNCITRAL, the Secretariat is encouraged to cooperate with the Hague Conference in whatever work might be entertained.

11. The Recommendations of the Legislative Guide and the World Bank Principles together form the uniform standard used in the Reports on Standards and Codes (ROSC) process. *See Creditor Rights and Insolvency Standard*, WORLD BANK, <http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRStandard-March2009.pdf> (last visited July 31, 2014).

12. *See, e.g.*, Carl Felsenfeld, Professor, Fordham University, Open Floor Remarks at the Proceedings of the Congress of the United Nations Commission on International Trade Law: Uniform Commercial Law in the Twenty-First Century (May 18–22, 1992).

13. UNCITRAL Secretariat, *Possible Future Work: Cross-Border Insolvency*, para. 51, U.N. Doc A/CN.9/378/Add.4 (June 23, 1993). All UNCITRAL documents are available at [www.uncitral.org](http://www.uncitral.org).

local law could be overridden by the effects of insolvency proceedings taking place elsewhere.<sup>14</sup> Instead of focusing on harmonization of substantive insolvency law, discussion focused on the growing significance of cross-border insolvency issues and the inadequacies of both domestic and international regimes for addressing those issues in a coordinated and predictable manner.

Texts were developed by various international organizations, including the Model International Insolvency Cooperation Act (MIICA), elaborated under the auspices of Committee J of the Section on Business Law of the International Bar Association, and approved by the Councils of the International Bar Association and the Section on Business Law in 1989; the 1990 European Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention), superseded by a draft European Union convention on insolvency proceedings that was never adopted, but revived in May 1999 in the form of a regulation on insolvency proceedings;<sup>14</sup> and the Cross-Border Insolvency Concordat (the Concordat),<sup>15</sup> adopted by the Council of the International Bar Association Section on Business Law (Paris, 17 September 1995) and by the Council of the International Bar Association (Madrid, 31 May 1996). Relevant work was also conducted by the American Law Institute on a framework for cross-border insolvencies among the member countries of the North American Free Trade Agreement (NAFTA).<sup>16</sup>

The conclusion of these instruments demonstrated that various aspects of cross-border insolvency were susceptible to international agreement and established the basis for advancing a more comprehensive solution. The MIICA showed that it was possible to negotiate a model law, but that its development by the members of a professional association may have potentially limited its appeal to governments.<sup>17</sup> The Concordat showed that cooperation, albeit between courts of principally common law jurisdictions, was possible and could significantly improve the management and

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14. Council Regulation 1346/2000 on insolvency proceedings was adopted by the Council on May 29, 2000 as 1346/2000, and entered into force on May 31, 2002. 2000 O.J. (L 160) 1 (EC).

15. The purpose of the Concordat, the fundamental approach of which is based on rules of private international law, is to suggest rules. Some of these rules may be applicable in any cross-border insolvency, which the participants or courts could adopt for dealing with a variety of issues. Those issues may include, for example, designation of the administrative forum, application of that forum's priority rules, certain rules for cases in which there is more than one administrative forum, and designation of applicable rules for avoidance of transfers of assets that took place in the period preceding the insolvency.

UNCITRAL Secretariat, *Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency*, para. 14, U.N. Doc. A/CN.9/398 (May 19, 1994) [hereinafter *Colloquium on Cross-Border Insolvency*].

16. See *id.* para. 11.

17. *Id.*

coordination of complex cross-border insolvency cases involving proceedings in different jurisdictions.<sup>18</sup>

### III. FOCUSING ON CROSS-BORDER INSOLVENCY: THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

#### A. INTRODUCTION

The Model Law, adopted by UNCITRAL in 1997, was a response, firstly, to the growing practical significance of cross-border insolvency, a natural by-product of the rapid globalization of economic activity taking place,<sup>19</sup> and, secondly, to the need to develop legal mechanisms that could limit the disparities in and conflicts between national laws that hampered achievement of the basic economic and social objectives of insolvency proceedings, and thus commercial activity.<sup>20</sup> UNCITRAL's challenge in negotiating the Model Law was to build upon the initiatives of the organizations noted above and to develop a text that could be both more inclusive and broader in application, embracing all legal traditions and countries at all stages of economic development.<sup>21</sup>

Commencing in 1993, UNCITRAL, in cooperation with INSOL International, undertook a series of studies and consultations.<sup>22</sup> From this, a consensus emerged that the work on cross-border insolvency should be narrow in scope and goals, and confined to establishing a limited number of basic principles and threshold rules that would facilitate efficiency in responding to cross-border insolvency cases.<sup>23</sup> Work should focus on those cross-border issues that would enable insolvency proceedings to be managed in a coordinated manner across several jurisdictions.<sup>24</sup> These issues were summarized as fitting within several sub-areas: judicial

18. TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* 55 (2009).

19. UNCITRAL, Working Group on Insolvency Law, *Possible Issues Relating to Judicial Cooperation and Access and Recognition in Cases of Cross-Border Insolvency*, para. 15, U.N. Doc. A/CN.9/WG.V/WP.42 (Sept. 26, 1995) [hereinafter *Possible Issues in Cross-Border Insolvency*].

20. *Colloquium on Cross-Border Insolvency*, *supra* note 15, para. 4; U.N. GAOR, 49th Sess., Supp. No. 17, U.N. Doc. A/49/17, para. 21 (1994).

21. Jenny Clift, *International Insolvency Law: The UNCITRAL Experience with Harmonization and Modernization Techniques*, 11 Y.B. PRIVATE INT'L L. 405, 424 (2009).

22. E. Flaschen & R. Harmer, *Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies: Expert Committee's Report on Cross-Border Insolvency Access and Recognition*, 5 INT'L INSOLVENCY REV. 140 (1996); *RECOGNITION AND ENFORCEMENT OF CROSS-BORDER INSOLVENCY: A GUIDE TO INTERNATIONAL PRACTICE* (N. Cooper & R. Jarvis eds., 1996). For a discussion of the conclusions drawn from the reports, see *Possible Issues in Cross-Border Insolvency*, *supra* note 19, paras. 8–14.

23. UNCITRAL, Working Group on Insolvency Law, Rep. on its 18th Sess., Oct. 30–Nov. 10, 1995, paras. 14, 18, U.N. Doc. A/CN.9/419 (Dec. 1, 1995) [hereinafter *Eighteenth Session Working Group Report*].

24. *Id.* para. 18.

cooperation (promoting cooperation among the courts of the States where the debtor's assets are located), and access and recognition<sup>25</sup> (granting access to local courts to representatives of foreign insolvency proceedings and creditors, and according recognition to certain orders issued by foreign courts).<sup>26</sup> The issue of relief was included when it was realized by the Working Group that what was also required was the ability to provide aid or assistance to recognized foreign proceedings. This might include, for example, provision of "some version of an automatic stay of execution of claims" that would provide at least a minimum period of time to examine the request of the foreign insolvency representative before a liquidation or dismemberment of the insolvent estate.<sup>27</sup> Other forms of relief considered for inclusion on the "minimum list of effects"<sup>28</sup> of recognition included authorizing the foreign representative to obtain information and evidence concerning assets and economic activities of the debtor, and to take control and manage debtor assets.<sup>29</sup> The question of whether or not to include on this "minimum list" the possibility of overturning transactions unfavorable to creditors was initially thought to be too complex because of the different treatments under national laws;<sup>30</sup> it was however, subsequently included.<sup>31</sup>

## B. ADDRESSING CHOICE OF LAW ISSUES

The cross-border insolvency of multinational enterprises gives rise to classic conflict of laws situations, "replete with choice of law concerns,"<sup>32</sup> such as the extent to which the insolvency law of one country can apply extraterritorially to govern the distribution of the debtor's assets in another country, the expectation of the creditors and other stakeholders as to the law that will apply to the debtor's insolvency, and the extent to which the different countries involved in the insolvency will cooperate and coordinate with each other. While the Model Law does not resolve all of the classic choice of law concerns, it does provide a choice of forum rule, through the COMI test. In addition to determining the insolvency law applicable to the proceedings, it also addresses issues of cooperation and coordination. Providing a framework for cross-border cooperation based on the choice of forum rule, the meaning of which has been refined in recent work, has encouraged a degree of deference to the foreign law of the main proceeding

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25. *Colloquium on Cross-Border Insolvency*, *supra* note 15, paras. 17–18; *see also Possible Issues in Cross-Border Insolvency*, *supra* note 19, para. 4.

26. *Id.*

27. U.N. GAOR, 50th Sess., Supp. No. 17, U.N. Doc. A/50/17, para. 393 (Nov. 28th, 1995).

28. Eighteenth Session Working Group Report, *supra* note 23, para. 57.

29. *Id.*

30. *Id.* para. 59.

31. *See, e.g., UNCITRAL, Working Group on Insolvency Law, Revised Articles of the Draft UNCITRAL Model Legislative Provisions on Cross-Border Insolvency*, at 14, art. 12(2)(b)(v), U.N. Doc. A/CN.9/WG.V/WP.46 (Sept. 6, 1996).

32. Pottow, *supra* note 4, at 943.



based on the debtor's COMI. Issues such as the extent to which the insolvency law of one country can apply extraterritorially to govern the distribution of the debtor's assets in another country are likely to be considered in ongoing work on the treatment of enterprise groups in insolvency and, in particular, the use of measures such as the so-called "synthetic secondary proceedings."<sup>33</sup>

The development of specific choice of laws rules fell largely outside the narrow scope of the 1993 UNCITRAL consensus, which had named four key issues (access, recognition, relief, and cooperation) essential to developing a framework for administering cross-border insolvency proceedings. The need to develop legal mechanisms for limiting the extent to which disparities and conflicts between national laws created unnecessary obstacles to insolvency proceedings and trade facilitation was acknowledged, but felt to be a possibility "that might in due time be considered for work by the Commission."<sup>34</sup>

Various conflicts of laws issues were raised in the preliminary studies as being areas in which problems might arise in cross-border insolvency cases due to lack of harmony among national laws. These included the types of proceeding involved;<sup>35</sup> priority rules in distribution of assets; recognition and treatment of security interests; avoidance of debtor's transactions prejudicial to creditors;<sup>36</sup> and the law applicable to ancillary proceedings.<sup>37</sup> Documents prepared for the consideration of the

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33. See, e.g., UNCITRAL Secretariat, *Facilitating the Cross-Border Insolvency of Multinational Enterprise Groups*, paras. 47–52, U.N. Doc. A/CN.9/WG.V/WP.120 (Feb. 11, 2014). The so-called synthetic proceedings involve treating foreign creditor claims in main proceedings in order to avoid the commencement of secondary proceedings.

34. *Colloquium on Cross-Border Insolvency*, *supra* note 15, para. 19.

35. *Possible Issues in Cross-Border Insolvency*, *supra* note 21, paras. 31–35. The working paper noted that adopting the approach of filtering proceedings that might be recognized by reference to the law of the recognizing state might exclude certain types of proceedings, such as those commenced without a requirement for the debtor to be declared insolvent.

36. UNCITRAL Secretariat, *Possible Future Work: Cross-Border Insolvency*, *supra* note 13, paras. 22–23, 27–30, 31–32. The specific issues included whether a foreign representative or only a local representative was entitled to request avoidance, whether a state would recognize a foreign decision avoiding a transaction, and which national law is applicable to a request for avoidance—the state of the foreign proceeding, the law of the state where the property is currently located or was located before the transaction, the law of the state of the person who benefitted from the transaction and the law applicable to the transaction. Standing for the foreign representative to initiate an avoidance action is provided in Article 23 of the Model Law; recognition of a foreign decision avoiding a transaction will likely be addressed in forthcoming work on the recognition and enforcement of insolvency-derived judgments, a mandate for which was recently given to Working Group V by the Commission. See U.N. GAOR, 69th Sess., Supp. No. 17, U.N. Doc. A/69/17, ¶ 155 (2014). Recognition and treatment of security interests is addressed in the UNCITRAL LEGISLATIVE GUIDE, *supra* note 7, rec. 4, and more generally in the UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2007).

37. *Possible Issues in Cross-Border Insolvency*, *supra* note 19, paras. 88–91. The working paper noted that in terms of the law to be applied to such proceedings, the MIICA provided the ancillary court should apply the substantive insolvency law of the jurisdiction of the foreign main proceeding.

UNCITRAL Working Group assigned to work on the topic suggest that these issues were not subsequently discussed as possible subjects for conflicts rules, as will be seen below, although some have been addressed in later UNCITRAL texts. Rather, the Working Group noted that various national law reform efforts underway were designed to foster a greater degree of universality in the administration of cross-border insolvencies as a basis for assistance “other than the basis of comity or mere rules of private international law.”<sup>38</sup> It was suggested that those efforts, which typically involved establishing mechanisms for granting court access to representatives of foreign insolvency proceedings and otherwise granting recognition for foreign proceedings, “might serve as an indication of what might be feasible in terms of international harmonization.”<sup>39</sup>

Key features of those national regimes were identified as including,

an opportunity for representatives of foreign proceedings to petition the court for ancillary proceedings, available at the discretion of the court or perhaps mandatory, to assist in the administration of the foreign insolvency proceeding; various forms of ancillary relief including injunctions blocking actions against the foreign debtor or its property in the forum and turnover of property to the foreign representative for administration in the foreign proceeding; possible suspension or dismissal of a forum insolvency proceeding in deference to pending foreign insolvency proceedings; the opportunity for the foreign representative to petition for a full, involuntary insolvency proceeding as an alternative to a mere ancillary proceeding; appearances before forum courts by foreign representatives treated as “special appearances”, thus not subjecting the foreign representative to the jurisdiction of the forum for any other purpose; criteria for assessing foreign proceedings for purposes of determining whether to recognize; court exercise of discretion as to whether to grant recognition or ancillary relief (e.g. similarity on essential points between the legal system of the forum state and the foreign state; just treatment of creditors; and comity).<sup>40</sup>

### C. THE MODEL LAW SCHEME – FINDING THE MIDDLE GROUND

The scheme of the Model Law is based on a request for recognition of foreign proceedings, whether main or non-main proceedings, by reference to the qualifying criteria of COMI and establishment. Proceedings not qualifying as either of these are not eligible for recognition under the Model Law, although the cooperation provisions of Chapter IV are available independent of recognition. The use of the COMI test has been described as a “multilateralist” choice of law rule, because it recognizes the possibility of there being several States interested in the insolvency proceedings and

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38. *Colloquium on Cross-Border Insolvency*, *supra* note 15, para. 8.

39. *Id.*

40. *Id.* para. 9.

attempts to find the nexus of greatest connection between one jurisdiction and the worldwide insolvency.<sup>41</sup> As a choice of principal forum test, it has important implications for the choice of insolvency law applied to main proceedings and the substantive outcomes for stakeholders.<sup>42</sup>

In the cross-border context, the Model Law uses the COMI test slightly differently to distinguish the treatment accorded to recognized proceedings. Recognition of main proceedings, for example, leads to certain specified effects that do not require the recognizing court to defer to the law of the commencing State. When discussing what those effects of recognition should be, the Working Group considered various options. One approach was an exhaustive enumeration of effects. A second approach involved a reference to applicable law, with three possible variations: the recognizing court determining effects (1) in accordance with domestic law, (2) in accordance with the law of the commencing jurisdiction, or (3) in accordance with either of those two laws.<sup>43</sup> The ease of application of domestic law, it was suggested, would facilitate recognition, make assistance to the foreign proceeding easier to grant, and make the instrument more acceptable to States.<sup>44</sup> Application of the law of the commencing State, on the other hand, was perceived as leading to a more consistent, harmonized result that avoided differences that might arise from the application of a law different to that of the main proceeding.<sup>45</sup> However, it was noted that ascertaining the content of the foreign insolvency law, should it prove necessary, could be a time-consuming exercise.<sup>46</sup> The mixed approach of applying either of those laws was said to afford the flexibility needed “to limit insulation of assets from insolvency proceedings and would therefore be in the best interests of creditors and of the maximization of the value of the insolvency estate.”<sup>47</sup>

A further suggestion, as a middle ground, was the adoption of a minimum list of measures that would be triggered by recognition—centering on the need to quickly protect assets and to maximize time for a comprehensive assessment of the situation—while simultaneously leaving room for the recognizing court to provide additional measures at its

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41. Pottow, *supra* note 4, at 971.

42. Jay Lawrence Westbrook, *Locating the Eye of the Financial Storm*, 32 BROOK. J. INT’L L. 1019, 1020 (2007).

43. Eighteenth Session Working Group Report, *supra* note 23, para. 50. The working paper prepared for that session noted that the Istanbul Convention contained a different set of provisions that neither exported the effects of the foreign insolvency into the recognizing state in their entirety nor converted the effect of the foreign proceedings into the effects an insolvency would entail if the proceedings had been opened in the recognizing state. *Possible Issues in Cross-Border Insolvency*, *supra* note 19, para. 44.

44. Eighteenth Session Working Group Report, *supra* note 23, para. 51.

45. *Id.* para. 52.

46. *Possible Issues in Cross-Border Insolvency*, *supra* note 19, para. 51.

47. Eighteenth Session Working Group Report, *supra* note 23, para. 53.

discretion.<sup>48</sup> This approach was viewed as accomplishing the introduction of basic enabling legislative provisions allowing for judicial cooperation and recognition of foreign insolvency proceedings and avoiding the need to decide whether the law of the receiving or commencing jurisdiction would apply.<sup>49</sup> While minimizing overreliance on judicial discretion, it nevertheless provides sufficient flexibility for judges to deal with cases in a manner that reflected practical considerations and circumstances of the particular case.<sup>50</sup> What remained to be considered were the contents on the minimum list.<sup>51</sup> This was resolved in favor of the adopted version of article 20 of the Model Law, which provides for the application of an automatic stay covering commencement or continuation of individual actions concerning the debtor's assets, rights, obligations, or liabilities; execution against the debtor's assets; and transfer, encumbrance, or other disposal of any of the debtor's assets.<sup>52</sup>

The approach of finding a neutral middle ground also applied to other provisions. An early definition of "foreign proceeding," for example, created a presumption that the proceeding was "properly opened" in the commencing State, and that there was a substantial connection between the debtor and the commencing State.<sup>53</sup> Both requirements were deemed to create uncertainty and were later deleted. A functional approach to what constituted a foreign proceeding was recommended in order to avoid having to assess the laws of the originating State. It was said that whether or not there was a substantial connection to the originating State, the proceeding would still be a proceeding emanating from that State.<sup>54</sup> Similarly, a requirement that the foreign representative be "duly appointed" in the foreign proceeding was opposed on the basis that it suggested the recognizing court could assess whether the procedural law of the originating jurisdiction had been followed.<sup>55</sup> A suggestion that a provision on the right of the foreign representative to compel production of information should be made subject to local law to address concerns about the availability of such measures in some jurisdictions was rejected on the basis that the Model

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48. *Id.* paras. 55–56.

49. *Id.* para. 58.

50. *Id.*

51. This approach has been described by one commentator as a failure to adopt a uniform choice of law rule. Segaal Schorr, *Avoidance Actions Under Chapter 15: Was Condor Correct?*, 35 FORDHAM INT'L L.J. 350, 363 (2011). The result should perhaps be seen in a different light on the basis that it was not necessary to provide a choice of law rule to achieve the goal of the project. Moreover, it avoided what might well have proven to be an unresolvable debate about whose law should apply. The result is a rule that provides significant certainty and predictability for the recognizing party and avoids undue reliance on judicial discretion.

52. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, art. 20, U.N. Sales No. E.14.V.2 (2014) [hereinafter MODEL LAW].

53. Eighteenth Session Working Group Report, *supra* note 23, paras. 95–105.

54. *Id.* para. 110.

55. *Id.* para. 117.

Law provision was intended to be the local law on the subject, “even if that meant . . . some modification of traditional practice or rules would be necessitated.”<sup>56</sup>

Recognition of both main and non-main proceedings permits relief under article 21 (which, in the case of main proceedings, is additional to that applicable under article 20 by virtue of recognition). This includes entrusting the distribution of the debtor’s assets to the foreign representative of the main or non-main proceeding,<sup>57</sup> with the qualification that assets can only be turned over to a non-main proceeding if the court is satisfied that those assets, under domestic choice of law rules, should be administered in the foreign non-main proceeding.<sup>58</sup> Thus, the jurisdiction presumed entitled to control the distribution of a debtor’s assets is based on a determination of the debtor’s COMI.<sup>59</sup> This approach is qualified by the public policy exception of article 6, the requirement to consider whether the interests of local creditors are adequately protected under article 21(2), and by the provisions of articles 28 and 29 that preserve the pre-eminence of local proceedings over any foreign proceeding (whether main or non-main).<sup>60</sup>

#### **D. ELABORATION OF THE TEST OF “CENTRE OF MAIN INTERESTS” (COMI)**

As a choice of jurisdiction rule, the test of COMI is somewhat imprecise, and has been criticized by some commentators for its reliance on judicial interpretation.<sup>61</sup> It has certainly been the subject of much academic and judicial debate. Nevertheless, it has gained a degree of acceptance as a concept, and its use seems to have spread beyond the Model Law and the EC Insolvency Regulation.<sup>62</sup> As a result of the debate, there appears to be an increasing coalescence around the way in which the determination of COMI should be approached, as well as the factors relevant to that determination.<sup>63</sup> UNCITRAL recently adopted a new Guide to Enactment and Interpretation of the Model Law, which seeks to bring greater certainty and predictability to the question of what constitutes a debtor’s COMI (as

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56. *Id.* para. 144.

57. MODEL LAW, *supra* note 52, art. 21(2).

58. *Id.* art. 21(3).

59. Pottow, *supra* note 4, at 965.

60. MODEL LAW, *supra* note 52, arts. 6, 21(2), 28, 29.

61. *See, e.g.,* Frederick Tung, *Is International Bankruptcy Possible?*, 23 MICH. J. INT’L L. 31 (2001).

62. Pottow, *supra* note 4, at 1002, citing its use in AM. LAW INST., TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES (2003); AM. LAW INST., TRANSNATIONAL INSOLVENCY: INTERNATIONAL STATEMENT OF UNITED STATES BANKRUPTCY LAW (2003); UNIDROIT, UNIDROIT PROTOCOL TO THE CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT art. XI (2001).

63. *See* UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY: THE JUDICIAL PERSPECTIVE (2011).

well as what constitutes a “foreign proceeding” for the purposes of article 2 of the Model Law). This work was undertaken in response to the lack of certainty and predictability evident in the jurisprudence relating to interpretation of the Model Law in enacting States. While there was no desire to change the terms of the Model Law itself, UNCITRAL’s Working Group V agreed that providing more information in the Guide to Enactment, which is used by many courts as an aid to interpretation of the Model Law,<sup>64</sup> might be sufficient to achieve the desired goal.<sup>65</sup>

The Model Law revisions include information taken from the Virgos Schmit report—an explanatory note for the European Union Convention on Insolvency Proceedings<sup>66</sup>—and from the EC Regulation.<sup>67</sup> With respect to the presumption in article 16 (3) of the Model Law that the debtor’s COMI is its place of registration, the revisions indicate the presumption is irrebuttable where the debtor’s COMI coincides with its place of registration.<sup>68</sup> This is true of most applications under the Model Law. However, where the debtor’s COMI does not coincide with its place of registration, the challenging party will have to establish its true location to the court of the State receiving the application for recognition.<sup>69</sup> The court will then have to make an independent assessment as to the location of the debtor’s COMI.<sup>70</sup> Two principal factors have been identified to assist in that assessment: whether (a) the location is where the debtor’s central administration takes place, and (b) the location is readily ascertainable by creditors.<sup>71</sup> Considered together, these factors “will tend [to] indicate whether the location in which the foreign proceeding has commenced is the debtor’s COMI.”<sup>72</sup> Where these factors do not yield a ready answer, additional factors<sup>73</sup> may be considered, with the court giving more or less

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64. See, e.g., *Akers v. Deputy Comm’n of Taxation*, [2014] FCAFC 57 (Austl.); *In re Stanford Int’l Bank Ltd.*, [2010] EWCA (Civ) 137 (Eng.); *In re Millennium Global Emerging Credit Master Fund Limited et al.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011).

65. UNCITRAL, Working Group V (Insolvency Law), Rep. on its 40th session, June 18–July 6, 2012, paras. 12–13, U.N. Doc A/CN.9/738 (2012).

66. Miguel Virgós and Etienne Schmit, *Report on the Convention of Insolvency Proceedings*, 6500/1996 (May 3, 1996). The report was published in July 1996, and is available at <http://aei.pitt.edu/952> (last visited July 31, 2014).

67. MODEL LAW, *supra* note 52.

68. *Id.* para. 142.

69. *Id.* para. 143.

70. *Id.*

71. *Id.* para. 145.

72. *Id.*

73. *Id.* para. 147. These factors include, in no particular order or priority: the location of the debtor’s books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor’s principal assets or operations are found; the location of the debtor’s primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was

weight to a given factor, depending on the circumstances of the individual case.<sup>74</sup>

The approaches adopted by the Model Law, although aspiring to universalism, were essentially influenced by pragmatism, with delegates and the Secretariat focusing on what it was possible to achieve and what it was not (described by one commentator as “middle roading”).<sup>75</sup> The long-standing practice in UNCITRAL is for decisions to be reached by consensus.<sup>76</sup> As a concept, consensus may not be easy to define, but the practice is nevertheless widely observed.<sup>77</sup> For that reason, typical questions when negotiating a harmonized text relate to the text’s goal and what is possible in substance that can be achieved, while simultaneously maintaining consensus. The overall approach adopted in a particular text will depend on the degree of harmonization sought—greater for a model law than for a legislative guide, which encourages compromise. While the Model Law adopts that middle path, at the same time, it is advancing the universalist agenda, recognizing the primacy of one proceeding (the main proceeding), albeit with what might be described as an incremental approach, and fostering greater acceptance of differences.

#### IV. AFTER THE MODEL LAW

##### A. PROMOTING ENACTMENT OF THE MODEL LAW

The successful conclusion of the Model Law was a first step of considerable importance on the road to establishing an international regime to facilitate the conduct of cross-border insolvency proceedings. Its subsequent adoption by some twenty States<sup>78</sup> (with possibly more than twenty additional States likely to follow over the course of 2014–2015)<sup>79</sup>

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being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

74. MODEL LAW, *supra* note 52, paras. 141–47.

75. Pottow, *supra* note 4, at 970 n.146.

76. UNCITRAL Secretariat, *UNCITRAL Rules of Procedure and Methods of Work*, sec. III, I.2, U.N. Doc. A/CN.9/638/Add.4 (Oct. 18, 2007) [hereinafter *UNCITRAL Rules of Procedure and Methods of Work*]. In 2010, the Commission formalized this practice, resolving that decisions should be reached by consensus as far as possible; in the absence of consensus, decisions are to be taken by voting in accordance with the relevant rules of procedure of the General Assembly. UNCITRAL, Rep. on its 43rd Sess., June 21–July 9, 2010, ann. III (UNCITRAL Rules of Procedure and Methods of Work: Summary of Conclusions), para. 2, U.N. GAOR, 65th Sess., Supp. No. 17, U.N. Doc. A/65/17 (2010).

77. See *UNCITRAL Rules of Procedure and Methods of Work*, paras. 20–21.

78. Australia (2008); British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2005); Canada (2005); Chile (2013); Colombia (2006); Greece (2010); Great Britain (2006); Japan (2000); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Poland (2003); Republic of Korea (2006); Romania (2003); Serbia (2004); Slovenia (2008); South Africa (2000); Uganda (2011); and the United States of America (2005).

79. According to information available to the UNCITRAL Secretariat, States that have already drafted legislation to enact the Model Law include the 18 members of OHADA, Kenya, and

has undoubtedly had an impact on the acceptance by States not only of the need for a legislative framework to facilitate the conduct of cross-border insolvencies, but also of what that framework might entail in terms of accommodating differences among insolvency laws and deferring to foreign laws. Work to promote the Model Law and to explain how the notions of cooperation and coordination upon which it rests and work in practice<sup>80</sup> have led to a growing familiarity with what is involved, which in turn has fostered a greater acceptance of the value of cooperation and coordination in cross-border proceedings. Providing information on the judicial decisions applying and interpreting the Model Law also contributes to this acceptance.<sup>81</sup>

The facilitation of judicial dialogue through the convening of multinational and regional judicial colloquia has enabled judges to share their experience and to appreciate that there are probably more areas of common ground than first expected. Having participated in some seven of the ten international judicial colloquia organized to date by UNCITRAL in cooperation with INSOL International and the World Bank,<sup>82</sup> I have heard numerous examples of judges acknowledging that they have had cases in which cross-border communication with other judges have assisted them in resolving very difficult questions of fact or in coordinating an approach to various aspects of the case, taking into account the best interests of all parties. While such communication may be more easily conducted between judges from similar legal traditions and language groups (there are, for example, many instances of cooperation and communication between the courts of Canada and the United States), it is interesting to see how participation at such events (and also in UNCITRAL working group sessions) can have a sensitizing effect that facilitates the acceptance of such ideas. An additional benefit of these colloquia, as many judges have stressed, is the opportunity to meet colleagues who may (and sometimes have) end up on the other side of a cross-border matter. Being able to put a face to the name makes the idea of communication easier to contemplate and to implement.

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Malawi. States that have passed legislation that may enact the Model Law include the Philippines and the Seychelles. States actively considering enacting the Model Law include Brazil, Dominican Republic, Vietnam, and Singapore.

80. Through convening judicial colloquiums (*see infra* note 82) and publications such as UNCITRAL, *supra* note 52.

81. *See Case Law on UNCITRAL Texts (CLOUT)*, [http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html) (including a number of abstracts of cases on the application and interpretation of the Model Law).

82. For reports of the Judicial Colloquia, *see UNCITRAL Colloquia*, [http://www.uncitral.org/uncitral/en/commission/colloquia\\_insolvency.html](http://www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html).



## **B. POSSIBLE FUTURE WORK: HARMONIZING DOMESTIC INSOLVENCY LAW**

Following completion and adoption of the Model Law in the 1997 session, topics proposed for possible future work included choice of law in insolvency proceedings, developing a treaty on judicial cooperation and assistance in cross-border insolvency, legislative treatment of cross-border insolvency in the banking and financial services sector, preparation of model agreements or practices for cross-border cooperation in reorganizations of insolvent enterprises, conflict-of-laws solutions in cross-border insolvency cases (possibly development of a convention), and the effects of insolvency proceedings on arbitration agreements and arbitral proceedings.<sup>83</sup> The Commission concluded at that 1997 session that before deciding on any of those topics, it would be preferable to evaluate the impact of, and the experience with, the Model Law and to await the results of similar work in other international forums, such as the European Union, and, possibly, the Organization of American States.<sup>84</sup> Accordingly, no further work was started at that time. It is interesting to note that evaluating experience with the Model Law is only now being considered in the context of examining the obstacles to its wider enactment and the feasibility of negotiating a treaty on selected international insolvency issues.<sup>85</sup> Notwithstanding the absence of this evaluation, the cross-border insolvency of large and complex financial institutions is also being studied,<sup>86</sup> experience with respect to insolvency agreements has been compiled,<sup>87</sup> and choice of law has again been proposed for future work.<sup>88</sup>

The events of the 1990s, including the Asian financial crisis, gave new impetus to pursue, if not substantive harmonization of insolvency law, then the development and adoption of global standards and norms that could inform and shape insolvency law reform. As a result of work undertaken by numerous international organizations following that crisis,<sup>89</sup> the debate about the centrality of insolvency regimes and what a good insolvency law should include advanced to the point where it was possible to think of distilling a comprehensive statement of the key objectives and principles that should be reflected in a State's insolvency laws. The Group of 22's (G-22) Working Group on International Financial Crises, reporting in 1998,

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83. U.N. GAOR, 52nd Sess., Supp. No. 17, U.N. Doc. A/52/17, ¶ 223 (1997).

84. *Id.* ¶ 224.

85. UNCITRAL, Working Group V (Insolvency Law), Rep. on its 44th Sess., July 7–25, 2014, paras. 18–19, U.N. Doc A/CN.9/798 [hereinafter Forty-Fourth Session Working Group Report].

86. *Id.* paras. 20–21.

87. See UNCITRAL PRACTICE GUIDE ON CROSS-BORDER INSOLVENCY COOPERATION, U.N. Sales No. E.10.V.6 (2009).

88. Forty-Fourth Session Working Group Report, *supra* note 85, para. 24.

89. The Asian Development Bank, the International Monetary Fund, the European Bank for Reconstruction and Development and the World Bank.

emphasized that effective insolvency and debtor-creditor regimes were an important means of limiting financial crises and facilitating rapid and orderly workouts from excessive indebtedness. A set of principles and key features for effective debtor-creditor regimes was identified.<sup>90</sup>

A proposal by Australia that UNCITRAL undertake work on a model national corporate insolvency law was based upon a number of factors<sup>91</sup> These included the successful negotiation of the Model Law in a relatively short time period, together with the links developed by UNCITRAL with other key participants in the insolvency framework, the broad cross-section of nations with different cultures and legal systems represented, and the familiarity of the UNCITRAL Secretariat with the many national policy issues connected with insolvency law.

UNCITRAL's mandate in undertaking this work was rather broad, referring to the development of a "comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including out-of-court restructuring, and a legislative guide containing flexible approaches to the implementation of such objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches. . . ."<sup>92</sup> That statement evolved into the UNCITRAL Legislative Guide on Insolvency Law, a text that is not intended to be enacted directly as law, but rather to inform national authorities and legislative bodies when preparing new laws and regulations, or when reviewing the adequacy of existing laws and regulations. In addition to formal insolvency proceedings, the Legislative Guide discusses the increasing use and importance of other tools for addressing insolvency, specifically restructuring negotiations entered into voluntarily between a debtor and its key creditors, which are not regulated by the insolvency law.

## V. THE UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW

The Legislative Guide incorporates both legislative recommendations and a commentary.<sup>93</sup> The commentary combines several elements. These include identifying an issue and indicating why it is important, outlining the various ways in which the issue might be addressed in national laws

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90. GROUP OF 22, REPORT OF THE WORKING GROUP ON INTERNATIONAL FINANCIAL CRISES, KEY PRINCIPLES AND FEATURES OF EFFECTIVE INSOLVENCY REGIMES (1998).

91. UNCITRAL, *Insolvency Law, Possible Future Work in the Area of Insolvency Law, Proposal by Australia*, Rep. on its 32d Sess., May 17–June 4, para. 140, U.N. Doc. A/CN.9/462/Add 1 (Apr. 13, 1999).

92. UNCITRAL LEGISLATIVE GUIDE, *supra* note 7, at iii, referring to the mandate given to the Working Group. U.N. GAOR, 55th Sess., Supp. No. 17, U.N. Doc. A/55/17, ¶¶ 400–09.

93. UNCITRAL LEGISLATIVE GUIDE, *supra* note 7.

(without identifying specific national laws or indicating what laws adopt which approach), discussing the advantages and disadvantages of each of those approaches, and concluding with a preferred option.<sup>94</sup> The recommendations are preceded by a purpose clause that provides both an introduction to the recommendations and a statement of the rationale for including recommendations on any particular topic. The recommendations themselves focus on harmonizing elements of substantive law, but do so by adopting different levels of specificity. Some employ specific legislative language to detail the manner in which a particular issue should be addressed in an insolvency law, reflecting a high degree of consensus in the Working Group as to the particular approach to be adopted.<sup>95</sup> Other recommendations identify key points to be addressed by an insolvency law with respect to a particular topic and offer possible alternative approaches, indicating the existence of different policy and procedural concerns that might need to be considered. Yet others serve as placeholders, reminding legislators and other users of the need to address particular issues, but not offering any particular solution. The recommendations do not reflect an exhaustive treatment of all of the issues discussed in the commentary. Some issues, such as those involving aspects of procedural law, are treated only in the commentary on the basis that it was unnecessary to reach agreement on a preferred approach. Other issues, whilst relevant to insolvency law, were felt to be outside the scope of the Legislative Guide. The absence of recommendations on other issues generally reflects the difficulty of achieving consensus. Examples include the precise mechanism, including relevant majorities, for voting on approval of a reorganization plan and the specific length of the suspect period for avoidable transactions.<sup>96</sup>

Unlike the Model Law, the Legislative Guide takes up the topic of applicable law, encouraging legislators to address it in a transparent and predictable manner in order to provide “certainty with respect to the effects of insolvency proceedings on the rights and claims of parties affected by those proceedings.”<sup>97</sup> However, it was a late inclusion in the subjects covered by the Guide, possibly because the topic was perceived as too difficult to address and also because of early skepticism as to the likelihood of a successful conclusion to the whole Guide project. Since insolvency law is deeply embedded in economic and cultural institutions that are not readily susceptible to change,<sup>98</sup> any kind of harmonization or convergence would, it was thought, be very hard to achieve. Indeed that skepticism

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94. Clift, *supra* note 21, at 419.

95. *Id.* at 420.

96. *Id.* at 421. For a detailed analysis of the recommendations of the Guide, see Susan Block-Lieb & Terence Halliday, *Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law*, 42 TEX. INT'L L.J. 475 (2007).

97. UNCITRAL LEGISLATIVE GUIDE, *supra* note 7, pt. two ch. I para. 80.

98. HALLIDAY & CARRUTHERS, *supra* note 18, at 134.

apparently persisted in some circles, I am told, up until the final text was ready for adoption by the Commission in 2004.

By 2003, significant progress had been made in the many topics covered by the Guide, and it was felt that applicable law could and should be addressed. A draft of the recommendation on applicable law was prepared for the Working Group in early 2003, following consultations with the Hague Conference on Private International Law and with UNCITRAL's Working Group VI, which was developing a legislative guide on secured transactions at that time.<sup>99</sup> That draft was not, however, considered by the Working Group until September of that year. In the meantime, the Commission had given approval in principle to "the policy considerations reflected in the draft legislative guide and the key objectives, general features and structure of an insolvency regime as being responsive to the mandate given to the working group, subject to completion consistent with the key objectives."<sup>100</sup> In approving the Guide in principle, the Commission noted that the Working Group had not yet had the opportunity to consider the issue of applicable law governing in insolvency proceedings.<sup>101</sup> However, it expressed considerable support for the importance of the issue to insolvency proceedings and the desirability of treating the topic in the draft legislative guide.<sup>102</sup>

When the Working Group did consider the draft text in September 2003, there were reservations as to whether agreement could be reached, and, in particular, whether it could be reached before the scheduled completion of the Guide in mid-2004, notwithstanding a general acknowledgment of the desirability of addressing applicable law issues.<sup>103</sup> The initial proposal included six recommendations.

Applicable law governing in insolvency proceedings

Recommendations

Purpose of legislative provisions

The purpose of provisions on the applicable law governing in insolvency proceedings is to:

(a) Promote cross-border financing, commerce and trade;

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99. UNCITRAL, Working Group V (Insolvency Law), Rep. on its 30th Sess., Mar. 29–Apr. 2, 2004, para. 24, U.N. Doc. A/CN.9/551 (Apr. 30, 2004) [hereinafter Thirtieth Session Working Group Report].

100. U.N. GAOR, 58th Sess., Supp. No. 17, U.N. Doc. A/58/17, ¶ 197 (2003).

101. *Id.* ¶ 196.

102. *Id.*

103. UNCITRAL, Working Group V (Insolvency Law), Rep. on its 29th Sess., Sep. 1–5, 2003, paras. 28–43, U.N. Doc. A/CN.9/542 (Dec. 3, 2003) [hereinafter Twenty-Ninth Session Working Group Report].

- (b) Facilitate commercial transactions by providing a clear and transparent basis for predicting the rules of law that will apply to the legal relationships with the debtor;
- (c) Provide courts with clear and predictable rules for the enforcement of choice of law provisions in contracts with a debtor; and
- (d) In the absence of a choice of law provision in a contract with the debtor, to provide courts with clear and predictable rules for determining the rules of law applicable to legal relationships with the debtor.

#### Contents of legislative provisions

##### Administration of insolvency proceedings

###### *Law of the forum*

- (1) The general insolvency law [of the State] should [apply] [be the law that applies] to all aspects of the commencement, conduct, administration and termination of insolvency proceedings, [in particular] [including]:
  - (a) Eligibility and commencement criteria;
  - (b) Creation and scope of the insolvency estate;
  - (c) Treatment of property of the estate, including the scope of, exceptions to, and relief from application of a stay;
  - (d) Powers of the debtor, insolvency representative, creditors and creditors' committee;
  - (e) Costs and expenses;
  - (f) Proposal, acceptance, confirmation and enforcement of a plan of reorganization;
  - (g) Treatment of legal acts detrimental to creditors;
  - (h) Conditions under which set-off can occur after commencement of insolvency proceedings;
  - (i) Effect of the commencement of the proceedings upon contracts and leases under which both the debtor and its counterparty have not yet fully performed their respective obligations, including the enforceability of automatic termination and anti-assignment provisions in those contracts and leases;
  - (j) Claims and their treatment; and
  - (k) Resolution and conclusion of the proceedings.

###### *Law other than the law of the forum*

- (2) As an exception to recommendation (1), the [general insolvency] law [of a State] may provide that the law of another State applies to [the avoidability of a transaction or set-off that occurred or an obligation that

was incurred before the commencement of those proceedings] [whether or not a transaction or set-off that occurred or an obligation that was incurred before the commencement of those proceedings is avoidable].

(3) [As a further exception to recommendation (1),] the general insolvency law should provide that the [acceleration,] [closeout,] set-off or netting of financial obligations and transactions pursuant to the rules of a payment or settlement system or a financial market, should not be subject to avoidance [except to the extent that recommendation (70)(a) would apply] [or unwinding]. The general insolvency law [of the State] should recognize the [acceleration,] [close-out,] set-off or netting pursuant to similar rules of a payment or settlement system or a financial market in another State.

#### Validity of contractual choice of law provisions

(4) The general insolvency law should recognize contractual provisions in which the debtor and its counterparty expressly agree that the law applicable to their legal relationship under the contract will be the law of a specified jurisdiction without regard to the nexus between the transaction or the parties at issue and the chosen applicable law, except where:

- (a) Consumer or employment transactions are involved;
- (b) Such a provision is viewed as manifestly contrary to a public policy of the jurisdiction whose law would apply in the absence of such a provision; or
- (c) Those provisions pertain to the priority, creation, perfection or enforceability of a security interest as against third parties.

#### Determining the applicable law

(5) The general insolvency law should clearly indicate when the rules of the insolvency law would be [subordinate to] [affected by] other laws of the jurisdiction. The insolvency law should recognize and respect rights, claims and other entitlements valid under non-insolvency law except to the extent it may be necessary to modify or postpone those rights, claims and entitlements in order to achieve the specific goals of the insolvency process.

(6) Where the general insolvency law or other applicable law [of the State] does not provide the governing legal rule, the insolvency court [before which insolvency proceedings have been commenced] should apply non-insolvency law. Where the law of more than one State is relevant to the application of the non-insolvency law, the insolvency court will need to apply a conflict of laws rule of the forum to determine which State's non-insolvency law should apply. The conflict of laws rules should be clear and predictable and should follow modern conflict of laws rules

embodied in international treaties and legislative guides sponsored by international bodies.<sup>104</sup>

At its September 2003 meeting, the Working Group expanded the list of areas to be covered by the law of the commencing State in Recommendation 1 to include the key elements of insolvency proceedings.<sup>105</sup> It requested that Recommendation 2 be redrafted to provide an exception to Recommendation 1 with respect to the law applicable to the avoidability of a transaction, or to a set-off that occurred before the commencement of insolvency proceedings.<sup>106</sup> Recommendation 3 was deleted.<sup>107</sup> Paragraphs (a) and (c) of Recommendation 4 were deleted. The remainder of the draft recommendation was retained, notwithstanding concerns that the resulting rule was not specific to insolvency and might suggest that the concept of public policy applicable in insolvency was different to the concept of public policy as it applied more generally.<sup>108</sup>

As to Recommendation 5, it was not clear to the Working Group whether this was intended to be a rule relating to the subordination of the insolvency law to the law of other jurisdictions or a purely domestic rule addressing the relationship between insolvency law and other law. If the latter, it was not a rule relating to conflict of laws, but one that should be included elsewhere in the Guide. The draft recommendation was retained as a rule indicating when the insolvency law would allow the application of the law of other jurisdictions.<sup>109</sup>

With regard to Recommendation 6, the Working Group agreed to retain the second and third sentences, especially since the latter encouraged the adoption of appropriate standards. The second sentence was revised to provide a rule that where there was a question of the application of law other than the insolvency law, the insolvency court should apply conflict of laws rules to determine which State's law should apply.<sup>110</sup>

Following that first consideration of the draft, the Secretariat was requested by the Working Group to prepare an appropriate commentary and to further consult with the Permanent Bureau of the Hague Conference on Private International Law to refine the existing recommendations. Those consultations took place informally in the last months of 2003 and considerable work was done to improve the text. A new draft chapter, including both commentary and recommendations, was finalized in January 2004.<sup>111</sup> The commentary stressed the need for an insolvency law to address

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104. These recommendations can be found in UNCITRAL Secretariat, *Draft Legislative Guide on Insolvency Law*, U.N. Doc. A/CN.9/WG.V/WP.63/Add.17 (Jan. 15, 2003).

105. Twenty-Ninth Session Working Group Report, *supra* note 103, para. 30.

106. *Id.* para. 31.

107. *Id.* para. 32.

108. *Id.* para. 33.

109. *Id.* para. 34.

110. *Id.* para. 35.

111. *Draft Legislative Guide on Insolvency Law*, *supra* note 104.

issues of applicable law transparently and predictably in order to provide certainty with respect to the effects of insolvency proceedings on the rights and claims of parties affected by those proceedings. It focused on application of the *lex fori concursus* to the commencement, conduct, administration, and conclusion of the insolvency proceedings and possible exceptions to that rule. The exceptions discussed included payment and settlement systems and regulated financial markets, labor contracts, security interests, avoidance provisions, and the different approaches that might be taken to each area. Not all of these possible exceptions were ultimately addressed in the recommendations.

The revised recommendations and the commentary presented a more coherent set of rules and explanatory materials. After renumbering to accord with the sequence of the draft Legislative Guide, Recommendation 179 provided a rule that the insolvency law should recognize rights and claims arising under general law, except to the extent of any express limitation in the insolvency law. The law applicable to the validity and effectiveness of those rights and claims existing at the time of the commencement of the insolvency proceedings should be determined by the private international law rules of the State in which the insolvency proceedings commenced.<sup>112</sup> The *lex fori concursus* was established as the law applicable to “all aspects of the commencement, conduct, administration and conclusion of insolvency proceedings,” with nineteen areas of the insolvency law (essentially following the contents of the Guide) indicated as areas to be covered.<sup>113</sup> Possible exceptions to that applicable law were provided: the effects of insolvency proceedings on the rights and obligations, or the participants in a payment or settlement system, or in a regulated financial market were to be governed by the law applicable to that system or market;<sup>114</sup> and the effects of insolvency proceedings on rejection, continuation, and modification of labor contracts could be governed by the law applicable to the contract.<sup>115</sup> Consistent with the general approach of the Legislative Guide of not necessarily including all possibilities in the

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112. UNCITRAL LEGISLATIVE GUIDE, *supra* note 7, rec. 30.

113. *Id.* rec. 31. These include: (a) Identification of the debtors that may be subject to insolvency proceedings; (b) Determination of when insolvency proceedings can be commenced and the type of proceeding that can be commenced, the party that can apply for commencement and whether the commencement criteria should differ depending upon the party applying for commencement; (c) Constitution and scope of the insolvency estate; (d) Protection and preservation of the insolvency estate; (e) Use or disposal of assets; (f) Proposal, approval, confirmation and implementation of a plan of reorganization; (g) Avoidance of certain transactions; (h) Treatment of contracts; (i) Set-off; (j) Treatment of secured creditors; (k) Rights and obligations of the debtor; (l) Duties and functions of the insolvency representative; (m) Functions of the creditors and creditor committee; (n) Treatment of claims; (o) Ranking of claims; (p) Costs and expenses relating to the insolvency proceedings; (q) Distribution of proceeds; (r) Conclusion of the proceedings; and (s) Discharge.

114. UNCITRAL LEGISLATIVE GUIDE, *supra* note 7, rec. 32.

115. *Id.* rec. 33.



recommendations, it was acknowledged that a State might wish to adopt further exceptions, although there is a general exhortation to limit those exceptions and to note them clearly in the insolvency law.<sup>116</sup>

That draft was discussed by the Working Group in April 2004.<sup>117</sup> Recommendation 179 was approved, but it was to be relocated elsewhere in the Guide as it did not address issues of applicable law; it now appears as Recommendation 3. Recommendations 180 to 182 were approved with minor changes. Recommendation 183 attracted considerable discussion. Amongst the concerns expressed were that employees of the debtor working in the forum State should be governed by the law of that State, that the contracts subject to the law of another State should be limited, and that the recommendation as drafted gave the impression that inclusion of such an exception was favored. It was pointed out that it was quite common for businesses to have employees working in different jurisdictions under different labor contracts and that the absence of such an exclusion from the law of the forum might have public policy implications, with the potential to cause uncertainty and impede the conduct of insolvency proceedings.<sup>118</sup> The discussion concluded that, notwithstanding those concerns, the recommendation should be retained. A further exception proposed for inclusion was for rights *in rem*. Some felt those rights were already covered by Recommendation 180 and the issue could, therefore, be addressed in the commentary. It was agreed that the section on applicable law should be included in the chapter on application and commencement.

Working Group VI (Security Interests) examined these draft recommendations in March 2004 and found them to be generally acceptable.<sup>119</sup> In particular, it was agreed that the commencement of insolvency proceedings should not displace the general, pre-insolvency conflict of laws rules applicable to the creation and effectiveness of a security right against third parties.<sup>120</sup> It was further agreed that commencement of insolvency proceedings should not displace the law applicable to priority of security rights, except to the extent explicitly provided in insolvency law. However, commencement could displace the rules applicable to the enforcement of security rights as enforcement should be subject to the insolvency law of the State in which the insolvency proceedings were commenced.<sup>121</sup>

The final text adopted by the Commission was as follows:

Purpose of legislative provisions

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116. *Id.* rec. 34.

117. Thirtieth Session Working Group Report, *supra* note 99, paras. 24–32.

118. *Id.* para. 30.

119. UNCITRAL, Working Group VI (Security Interests), Rep. on its 5th session, Mar. 22–25, 2004, para. 34, U.N. Doc. A/CN.9/549 (Mar. 31, 2004).

120. *Id.*

121. *Id.*

The purpose of provisions on the applicable law in insolvency proceedings is:

- (a) To facilitate commerce by recognizing, in insolvency proceedings, the rights and claims that arise before commencement of insolvency proceedings and the law that will apply to the validity and effectiveness of those rights and claims; and
- (b) To establish the law applicable in insolvency proceedings and exceptions, if any, to the application of that law.

#### Contents of legislative provisions

##### Law applicable to validity and effectiveness of rights and claims

30. The law applicable to the validity and effectiveness of rights and claims existing at the time of the commencement of insolvency proceedings should be determined by the private international law rules of the State in which insolvency proceedings are commenced.

##### Law applicable in insolvency proceedings: *lex fori concursus*

31. The insolvency law of the State in which insolvency proceedings are commenced (*lex fori concursus*) should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects. These may include, for example:

- (a) Identification of the debtors that may be subject to insolvency proceedings;
- (b) Determination of when insolvency proceedings can be commenced and the type of proceeding that can be commenced, the party that can apply for commencement and whether the commencement criteria should differ depending upon the party applying for commencement;
- (c) Constitution and scope of the insolvency estate;
- (d) Protection and preservation of the insolvency estate;
- (e) Use or disposal of assets;
- (f) Proposal, approval, confirmation and implementation of a plan of reorganization;
- (g) Avoidance of certain transactions that could be prejudicial to certain parties;
- (h) Treatment of contracts;
- (i) Set-off;
- (j) Treatment of secured creditors;
- (k) Rights and obligations of the debtor;
- (l) Duties and functions of the insolvency representative;
- (m) Functions of the creditors and creditor committee;

- (n) Treatment of claims;
- (o) Ranking of claims;
- (p) Costs and expenses relating to the insolvency proceedings;
- (q) Distribution of proceeds;
- (r) Conclusion of the proceedings; and
- (s) Discharge.

Exceptions to the application of the law of the insolvency proceedings

32. Notwithstanding recommendation 31, the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market should be governed solely by the law applicable to that system or market.

33. Notwithstanding recommendation 31, the effects of insolvency proceedings on rejection, continuation and modification of labour contracts may be governed by the law applicable to the contract.

34. Any exceptions additional to recommendations 32 and 33 should be limited in number and be clearly set forth or noted in the insolvency law.<sup>122</sup>

In addition to specifically addressing applicable law issues, the Legislative Guide seeks to reduce conflict of laws by harmonizing approaches to issues such as priority provisions, recommending that the priorities accorded to unsecured claims should be minimized and clearly stated in the insolvency law.<sup>123</sup> As one commentator suggests, “the elimination and reduction of priority provisions for special creditors provides fewer points for sovereigns to fight about when comparing the varying potential dispositions of a bankruptcy.”<sup>124</sup> While it is hard to assess the impact of the Legislative Guide on law reform (as it is not a text that is intended to be adopted as such), it is nevertheless apparent that it has had an impact in States that have engaged in insolvency law reform in the last decade or so, especially where the World Bank and the International Monetary Fund have been involved.<sup>125</sup> To the extent that it reflects a convergence around the goals<sup>126</sup> and content of insolvency law, the

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122. UNCITRAL LEGISLATIVE GUIDE, *supra* note 7, pt. two ch. I § C.

123. *Id.* rec. 187.

124. Pottow, *supra* note 4, at 1008.

125. *See Creditor Rights and Insolvency Standard*, *supra* note 11.

126. In 2003, the International Working Group on European Insolvency Law, established by the Business and Law Research Centre at the University of Nijmegen in the Netherlands, completed its “Principles of European Insolvency Law” (2003). WORKING GROUP ON EUROPEAN INSOLVENCY LAW, PRINCIPLES OF EUROPEAN INSOLVENCY LAW (2003). The Introduction notes that, notwithstanding the apparent and continuing diversity of national insolvency laws within the EU, many of those insolvency laws appeared to have common elements that, once identified, might provide the foundation for greater harmonization, thus responding to a concern that despite

Legislative Guide can be expected to promote a reduction of the areas of difference between insolvency laws and the different outcomes that might be expected.

## VI. FUTURE WORK

In December 2013, UNCITRAL's Working Group on Insolvency Law held a colloquium and working group session to consider its future work program.<sup>127</sup> The first task will be to continue work on the insolvency of enterprise groups and, in particular, to develop provisions that could extend the UNCITRAL Model Law and part three of the UNCITRAL Legislative Guide by addressing issues relating to the cross-border insolvency of enterprise groups, including: access to foreign courts and standing for foreign representatives and creditors of insolvency proceedings involving different enterprise group members; recognition of foreign proceedings and foreign representatives (as between different proceedings concerning different group members); recognition of one foreign proceeding as the coordinating proceeding or identification of the "parent" and/or "primary group members" of an enterprise group (in order, for example, to facilitate development of a reorganization (or liquidation) plan and coordinate proceedings); joint appointment of insolvency representatives to insolvency proceedings concerning different group members; voluntary participation of solvent group members in the insolvency proceedings of group members; use of "synthetic secondary proceedings"; joint/coordinated disclosure statements and plans of reorganization; and relief that may be provided to assist the conduct of the proceedings of several group members.<sup>128</sup> The second task will be to consider the obligations of directors of enterprise group members in the period approaching insolvency by studying how part four of the Legislative Guide might be applied to enterprise groups.<sup>129</sup> A number of these issues will again raise questions of choice of law that might need to be considered.<sup>130</sup>

A number of additional topics for possible future work by the Working Group have been proposed,<sup>131</sup> including (i) choice of law; (ii) issues concerning creditors and claims, such as establishing global standards for

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the ongoing economic integration in Europe and the trans-border nature of European business, insolvency laws continued to show substantial differences in underlying policy considerations, structure, and content.

127. The report of the colloquium is contained in UNCITRAL Secretariat, *Report of the Fourth International Insolvency Law Colloquium*, para. 24, U.N. Doc. A/CN.9/815 (May 2, 2014). The working group session report is located in *Forty-Fourth Session Working Group Report*, *supra* note 85.

128. *Forty-Fourth Session Working Group Report*, *supra* note 85, para. 16.

129. *Id.* para. 23.

130. *Id.*

131. The proposals relating to these new topics can be found in UNCITRAL Secretariat, *Background Information on Topics Comprising the Current Mandate of Working Group V and Topics for Possible Future Work*, U.N. Doc A/CN.9/WG.V/WP.117 (Oct. 8, 2013).

claims adjudication and ranking of claims; (iii) guidelines for relative voting rights of debt and equity holders; (iv) coordinating creditor access to information and collective representation; (v) the insolvency treatment of financial contracts and netting in the UNCITRAL Legislative Guide; (vi) regulation of insolvency practitioners; (vii) enforcement of insolvency-derived judgments; and (viii) treatment of intellectual property contracts in cross-border insolvency cases. While there was some support in the Working Group for treating choice of law as a separate topic, it was generally agreed that it should be approached, at least in the immediate future, by reference to those aspects of choice of law necessary to address enterprise group insolvency and directors' obligations.<sup>132</sup>

At its plenary session in July 2014, the Commission gave the insolvency Working Group a mandate to add to its current work program the possible development of a model law or model provisions on the recognition and enforcement of insolvency-derived judgments and, when that is completed, to consider insolvency regimes for micro, small, and medium-sized enterprises.

## CONCLUSION

The goal of this paper has been to suggest that, while UNCITRAL has addressed choice of law issues in a rather limited manner, the work it has done should not be seen as a "failure" to address those issues, but rather a conscious choice to achieve the goals it has set itself by different means. Of necessity, its approach to harmonization of insolvency law has accommodated compromise and may sometimes have resulted in rather small steps towards that goal and the postponement of difficult technical or controversial questions. Small steps not only accommodate degrees of difficulty in the subject matter, but they also provide time for the protagonists in the harmonization process to become familiar with those issues and, hopefully, to develop a degree of appreciation and acceptance of the differences between laws and the policies and national imperatives that lie behind them. The greater the extent to which insolvency law reform reflects the objectives and the substance of the texts developed by UNCITRAL, the less there will be to disagree about in formulating substantive elements of new topics going forward.

The work completed to date forms a strong foundation upon which new insolvency law topics can be developed. Looking back at issues raised along the way, including some relating to choice of law, it is interesting to see how many of them have been addressed in one way or another in different texts. Increasingly, it is likely that choice of law issues in insolvency will form an integral part of that work as indicated above and, at some future point, be taken up as a topic in its own right.

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132. Forty-Fourth Session Working Group Report, *supra* note 85, para. 24.